UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD

DANIEL LAZAR,
Appellant,

v.

DEPARTMENT OF HOMELAND SECURITY,
Agency.

DOCKET NUMBER
CH-0752-15-0371-I-2

DATE: March 9, 2023

THIS FINAL ORDER IS NONPRECEDENTIAL[1]

Joel J. Kirkpatrick, Esquire, and Jeff T. Schrameck, Esquire, Plymouth, Michigan, for the appellant.

Trina R. Mengesha Brown, Southfield, Michigan, for the agency.

BEFORE

Cathy A. Harris, Vice Chairman
Raymond A. Limon, Member
Tristan L. Leavitt, Member[2]

[1] A nonprecedential order is one that the Board has determined does not add significantly to the body of MSPB case law. Parties may cite nonprecedential orders, but such orders have no precedential value; the Board and administrative judges are not required to follow or distinguish them in any future decisions. In contrast, a precedential decision issued as an Opinion and Order has been identified by the Board as significantly contributing to the Board's case law. *See* 5 C.F.R. § 1201.117(c).

[2] Member Leavitt's name is included in decisions on which the three-member Board completed the voting process prior to his March 1, 2023 departure.

FINAL ORDER

¶1 The agency has filed a petition for review of the initial decision, which reversed the agency's removal action. Generally, we grant petitions such as this one only in the following circumstances: the initial decision contains erroneous findings of material fact; the initial decision is based on an erroneous interpretation of statute or regulation or the erroneous application of the law to the facts of the case; the administrative judge's rulings during either the course of the appeal or the initial decision were not consistent with required procedures or involved an abuse of discretion, and the resulting error affected the outcome of the case; or new and material evidence or legal argument is available that, despite the petitioner's due diligence, was not available when the record closed. Title 5 of the Code of Federal Regulations, section 1201.115 (5 C.F.R. § 1201.115). After fully considering the filings in this appeal, we conclude that the petitioner has not established any basis under section 1201.115 for granting the petition for review. Therefore, we DENY the petition for review and AFFIRM the initial decision, which is now the Board's final decision. 5 C.F.R. § 1201.113(b).

BACKGROUND

¶2 The agency removed the appellant, a Federal Air Marshal, SV-1801-I, for off-duty misconduct and lack of candor. *Lazar v. Department of Homeland Security*, MSPB Docket No. CH-0752-15-0371-I-1, Initial Appeal File (IAF), Tab 4, Subtab 4a, Subtab 4b at 1-2. The charges that formed the basis of the removal action originated from the agency's investigation of a July 17, 2014 altercation between the appellant and his wife at a heavy metal music festival. IAF, Tab 4, Subtab 4e at 1, Subtab 4f. In a November 21, 2014 proposal to remove the appellant, the agency alleged that he engaged in misconduct when he grabbed his wife by the throat during the July 17, 2014 altercation, and that he was "not fully forthcoming or candid" during an August 14, 2014 interview with agency investigators in which he denied touching his wife's neck during the

altercation. IAF, Tab 4, Subtab 4e at 1-3. Following the appellant's oral and written replies, the agency issued a March 2, 2015 decision removing him from the agency, effective March 4, 2015. IAF, Tab 4, Subtabs 4a-4b.

¶3 The appellant appealed the removal action; he argued that the agency's action was unjustified because he had not committed the charged misconduct. IAF, Tab 1 at 3; *Lazar v. Department of Homeland Security*, MSPB Docket No. CH-0752-15-0371-I-2, Appeal File (I-2 AF), Tab 13 at 5. After a hearing, the administrative judge issued an initial decision that reversed the removal action. I-2 AF, Tab 26, Initial Decision (ID). In reaching her decision, the administrative judge considered the written statements of four security guards who witnessed the July 17, 2014 altercation and the testimony of five witnesses who testified to the alleged misconduct, four of whom witnessed the July 17, 2014 altercation: one of the security guards who had provided a written statement, the appellant, the appellant's wife, and an acquaintance of the appellant and his wife.[3] ID at 7-13. The administrative judge found the security guards' written statements, which all observed that the appellant had either grabbed his wife by the throat or choked her, to be inconsistent in significant ways and afforded them less weight than the testimony of the witnesses at hearing. ID at 7, 16-17; *see also* IAF, Tab 4, Subtab 4f at 21-24. She further found that each eyewitness who testified did so in a straightforward manner and did not appear misleading, but she found the security guard's testimony, which confirmed the appellant had grabbed his wife by the throat during the altercation,

[3] The administrative judge found that during the evening of July 17, 2014, the appellant and his wife were joined at the music festival by a friend of the appellant's and the friend's companion. ID at 2. Although the agency alleged that the appellant's wife and this companion were friends, the administrative judge found that the companion had not met the appellant or his wife until July 17, 2014, and was not friends with them when she gave her written statement, despite evidence that the companion and the appellant's wife later became friends. ID at 15-16; *see also* I-2 AF, Hearing Transcript (HT) at 14-15 (testimony of the agency investigator); HT at 158, 161 (testimony of the acquaintance). Accordingly, we refer to the companion as an acquaintance of the appellant and his wife.

implausible at times. ID at 16-18. She found the testimony of the appellant, his wife, and the acquaintance, each of whom testified that the appellant did not grab his wife's throat, to be consistent with each other and with other evidence in the record. ID at 15-16, 18-19. Thus, the administrative judge credited the testimony of the appellant, his wife, and the acquaintance over that of the security guard and found it more likely than not that the appellant did not grab his wife by the throat during the July 17, 2014 altercation. ID at 18-19. The lack of candor charge relied on the evidence supporting the misconduct charge to establish that the appellant was not forthcoming with investigators when he denied touching his wife's neck, and the administrative judge found that there was no evidence the appellant had provided any inaccurate or incomplete information when making this denial. ID at 19-20. Accordingly, the administrative judge found that the agency had not proven either charge and reversed the removal. ID at 20.

¶4 The agency has filed a petition for review in which it argues that the administrative judge erred in her credibility findings, the charges were supported by the record, and the penalty of removal was reasonable. Petition for Review (PFR) File, Tab 1 at 6-18. The appellant has filed a response opposing the petition, to which the agency has filed a reply.[4] PFR File, Tabs 3, 4.

[4] In his response, the appellant alleges that the agency failed to comply with the interim relief order to the extent that it failed to pay, or take appropriate steps to pay, the appellant for the period set forth in the interim relief order prior to filing the petition for review. PFR File, Tab 3 at 31. When, as here, the appellant is the prevailing party in an initial decision that grants interim relief, any petition for review filed by the agency must be accompanied by a certification that the agency has complied with the interim relief order, either by providing the required interim relief or by satisfying the requirements of 5 U.S.C. § 7701(b)(2)(A)(ii) and (B). *Archerda v. Department of* Defense, 121 M.S.P.R. 314, ¶ 11 (2014); 5 C.F.R. § 1201.116(a). In its petition, the agency certified that it had initiated processing the appellant's return to duty, effective September 1, 2016, in accordance with the interim relief order. PFR File, Tab 1 at 2. In its reply to the appellant's response, the agency provided documentation showing payment to him for the time period from the issuance of the initial decision to the date of his return to work, and payment for hours worked. PFR File, Tab 4 at 14. We find that the agency has provided interim relief concerning payments due to the appellant.

DISCUSSION OF ARGUMENTS ON REVIEW

¶5 The Board must defer to an administrative judge's credibility determinations when they are based, explicitly or implicitly, on observing the demeanor of witnesses testifying at a hearing. *Haebe v. Department of Justice*, 288 F.3d 1288, 1301 (Fed. Cir. 2002). Although the Board may decline to defer to an administrative judge's credibility findings that are abbreviated, based on improper considerations, or unsupported by the record, *Redschlag v. Department of the Army*, 89 M.S.P.R. 589, ¶ 13 (2001), it may not overturn an administrative judge's demeanor-based credibility findings merely because it disagrees with those findings, *Purifoy v. Department of Veterans Affairs*, 838 F.3d 1367, 1372 (Fed. Cir. 2016) (quoting *Haebe*, 288 F.3d at 1299). We have considered the agency's arguments on review challenging the administrative judge's credibility findings regarding the charged misconduct, and we conclude that the agency's evidence supporting its arguments is insufficient for the Board to decline deferring to the administrative judge's reasoned credibility findings.

¶6 On review, the agency argues that the administrative judge erred when she failed to sustain the agency's charges, despite written statements from four security guards who witnessed the altercation and testimony from one of the security guards who provided a statement, which were provided by disinterested witnesses and consistent in their observation that the appellant grabbed his wife by the throat during the July 17, 2014 altercation. PFR File, Tab 1 at 6-12. The agency asserts that the minor inconsistencies in the written statements are attributable to differences in the witnesses' arrival time to the altercation. *Id.* at 11. The agency also argues that the administrative judge failed to find that the acquaintance testified inconsistently with her written statement, and neither she nor the appellant's wife was an impartial witness. *Id.* at 12-14.

¶7 The initial decision reflects that the administrative judge reviewed each written statement and witness's testimony as it pertained to the charged misconduct, and she made detailed credibility findings that considered each of the

factors set forth in *Hillen v. Department of the Army*, 35 M.S.P.R. 453, 458 (1987).[5] *See* ID at 7-19. Her findings addressed the agency's explanation at the hearing of the inconsistencies in the written statements; in particular, she observed that she did not have the opportunity to hear the testimony of the security guards who wrote three of the statements relied upon by the agency, which left the inconsistencies in their statements unexplained and the statements entitled to less weight. ID at 16-17. The administrative judge had issued subpoenas at the agency's request for the three security guards, but they did not appear for the hearing, and the agency did not seek to enforce the subpoenas.[6] ID at 7 n.1, 8 nn.2-3.

¶8 We have considered the consistency of the security guards' written statements with the testimony of the lone security guard who testified at the hearing, but we find no reason to disturb the administrative judge's detailed, reasoned findings regarding the credibility of the statements and witnesses. The written statements of the security guards constitute hearsay evidence and the assessment of the probative value of hearsay evidence necessarily depends on the circumstances of each case.[7] *Shannon v. Department of Veterans Affairs*,

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[5] To resolve credibility issues, an administrative judge must identify the factual questions in dispute, summarize the evidence on each disputed question, state which version she believes, and explain in detail why she found the chosen version more credible, considering such factors as: (1) the witness's opportunity and capacity to observe the event or act in question; (2) the witness's character; (3) any prior inconsistent statement by the witness; (4) a witness's bias, or lack of bias; (5) the contradiction of the witness's version of events by other evidence or its consistency with other evidence; (6) the inherent improbability of the witness's version of events; and (7) the witness's demeanor. *Hillen*, 35 M.S.P.R. at 458.

[6] Board subpoenas are enforceable in U.S. district court. 5 C.F.R. § 1201.85.

[7] In assessing the weight to accord hearsay evidence, the relevant factors include the following: (1) the availability of persons with firsthand knowledge to testify at the hearing; (2) whether the statements of the out-of-court declarants were signed or in affidavit form, and whether anyone witnessed the signing; (3) the agency's explanation for failing to obtain signed or sworn statements; (4) whether declarants were disinterested witnesses to the events, and whether the statements were routinely made; (5) consistency of declarants' accounts with other information in the case, internal

121 M.S.P.R. 221, ¶ 15 (2014); *Borninkhof v. Department of Justice*, 5 M.S.P.R. 77, 83-87 (1981). Generally, testimony under oath or penalty of perjury before the trier of fact, which is subject to the rigors of cross examination, is more probative than unsworn, out-of-court statements. *See Social Security Administration v. Whittlesey*, 59 M.S.P.R. 684, 692 (1993), *aff'd*, 39 F.3d 1197 (Fed. Cir. 1994) (Table). Here, the administrative judge's findings—that the written statements, which were not sworn or made under penalty of perjury, were inconsistent with each other and with the security guard's testimony—are well-reasoned and supported by the record; accordingly, we must afford the administrative judge's findings the deference they are due.[8] ID at 16-18. Similarly, we have considered the inconsistencies in the acquaintance's written statement and testimony, and the wife's and acquaintance's alleged bias, but given the administrative judge's detailed findings regarding these issues and her opportunity to observe the witness's demeanor at the hearing, we defer to those findings.

¶9 The agency also argues that the administrative judge substituted her own judgment to find that certain aspects of the security guard's testimony were not plausible; however, her reasoned findings regarding the plausibility of his testimony were necessarily intertwined with issues of credibility and entitled to deference. PFR File, Tab 1 at 9-10. The Board must defer to an administrative

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consistency, and their consistency with each other; (6) whether corroboration for statements can otherwise be found in the agency record; (7) the absence of contradictory evidence; and (8) the credibility of declarant when he made the statement attributed to him. *Borninkhof v. Department of Justice*, 5 M.S.P.R. 77, 87 (1981). Although the administrative judge did not specifically recount these factors in making her findings regarding the statements of the security guards, she considered the appropriate factors for assessing the probative value of hearsay evidence. ID at 7-19.

[8] The agency's investigation of the July 17, 2014 altercation included an interview with, and a sworn statement from, the appellant, but the agency did not interview or obtain sworn statements from the security guards, who provided written statements to the local sheriff's office. IAF, Tab 4, Subtab 4f at 37-41; HT at 22 (testimony of the agency investigator); *see also* IAF, Tab 4, Subtab 4f at 21-24.

judge's credibility determinations not only when they explicitly rely on demeanor but also when they do so "by necessary implication." *Purifoy*, 838 F.3d at 1373 (citing *Jackson v. Veterans Administration*, 768 F.2d 1325, 1331 (Fed. Cir. 1985)). When, as here, an administrative judge has heard live testimony, her credibility determinations must be deemed to be at least implicitly based upon the demeanor of the witnesses. *Haebe*, 288 F.3d at1301; *Little v. Department of Transportation*, 112 M.S.P.R. 224, ¶ 4 (2009). The administrative judge acknowledged that the witnesses offered conflicting versions of the altercation and made detailed, reasoned findings regarding the plausibility of the events retold in the security guard's testimony to determine which version of events she deemed more credible. ID at 13, 16-18. Significantly, the administrative judge observed that the security guard who testified was the only security guard to recall that the appellant had his hands around his wife's neck before her fall and that the appellant broke free from restraint to grab his wife's throat after the fall, and she concluded that the security guard's recollection was not plausible given other undisputed facts about the altercation. ID at 16-18; *see* I-2 AF, Hearing Transcript (HT) at 81-84 (testimony of the security guard).

¶10 Accordingly, we discern no reason to disturb the administrative judge's finding that the agency failed to prove the charge of off-duty misconduct, as the record reflects that the administrative judge considered the evidence as a whole, drew appropriate inferences from the evidence, and made reasoned conclusions on the issue of credibility. ID at 19; *see Clay v. Department of the Army*, 123 M.S.P.R. 245, ¶¶ 6-8 (2016) (finding no reason to disturb the administrative judge's findings when she considered the evidence as a whole, drew appropriate inferences, and made reasoned conclusions on the issue of credibility); *Broughton v. Department of Health and Human Services*, 33 M.S.P.R. 357, 359 (1987) (same). We similarly decline to disturb the administrative judge's finding that the agency failed to prove the charge of lack of candor, as that charge was premised on the fact that the appellant grabbed his wife by the throat in the

July 17, 2014 altercation, which the agency did not prove by preponderant evidence. ID at 19-20. The initial decision is therefore affirmed.

ORDER

¶11 We ORDER the agency to cancel the appellant's removal and to retroactively restore the appellant effective March 4, 2015. *See Kerr v. National Endowment for the Arts*, 726 F.2d 730 (Fed. Cir. 1984). The agency must complete this action no later than 20 days after the date of this decision.

¶12 We also ORDER the agency to pay the appellant the correct amount of back pay, interest on back pay, and other benefits under the Office of Personnel Management's regulations, no later than 60 calendar days after the date of this decision. We ORDER the appellant to cooperate in good faith in the agency's efforts to calculate the amount of back pay, interest, and benefits due, and to provide all necessary information the agency requests to help it carry out the Board's Order. If there is a dispute about the amount of back pay, interest due, and/or other benefits, we ORDER the agency to pay the appellant the undisputed amount no later than 60 calendar days after the date of this decision.

¶13 We further ORDER the agency to tell the appellant promptly in writing when it believes it has fully carried out the Board's Order and of the actions it has taken to carry out the Board's Order. The appellant, if not notified, should ask the agency about its progress. *See* 5 C.F.R. § 1201.181(b).

¶14 No later than 30 days after the agency tells the appellant that it has fully carried out the Board's Order, the appellant may file a petition for enforcement with the office that issued the initial decision on this appeal if the appellant believes that the agency did not fully carry out the Board's Order. The petition should contain specific reasons why the appellant believes that the agency has not fully carried out the Board's Order, and should include the dates and results of any communications with the agency. 5 C.F.R. § 1201.182(a).

¶15 For agencies whose payroll is administered by either the National Finance Center of the Department of Agriculture (NFC) or the Defense Finance and Accounting Service (DFAS), two lists of the information and documentation necessary to process payments and adjustments resulting from a Board decision are attached. The agency is ORDERED to timely provide DFAS or NFC with all documentation necessary to process payments and adjustments resulting from the Board's decision in accordance with the attached lists so that payment can be made within the 60-day period set forth above.

NOTICE TO THE APPELLANT REGARDING YOUR RIGHT TO REQUEST ATTORNEY FEES AND COSTS

You may be entitled to be paid by the agency for your reasonable attorney fees and costs. To be paid, you must meet the requirements set forth at Title 5 of the United States Code (5 U.S.C.), sections 7701(g), 1221(g), or 1214(g). The regulations may be found at 5 C.F.R. §§ 1201.201, 1201.202, and 1201.203. If you believe you meet these requirements, you must file a motion for attorney fees and costs WITHIN 60 CALENDAR DAYS OF THE DATE OF THIS DECISION. You must file your motion for attorney fees and costs with the office that issued the initial decision on your appeal.

NOTICE OF APPEAL RIGHTS[9]

You may obtain review of this final decision. 5 U.S.C. § 7703(a)(1). By statute, the nature of your claims determines the time limit for seeking such review and the appropriate forum with which to file. 5 U.S.C. § 7703(b). Although we offer the following summary of available appeal rights, the Merit Systems Protection Board does not provide legal advice on which option is most appropriate for your situation and the rights described below do not represent a

[9] Since the issuance of the initial decision in this matter, the Board may have updated the notice of review rights included in final decisions. As indicated in the notice, the Board cannot advise which option is most appropriate in any matter.

statement of how courts will rule regarding which cases fall within their jurisdiction. If you wish to seek review of this final decision, you should immediately review the law applicable to your claims and carefully follow all filing time limits and requirements. Failure to file within the applicable time limit may result in the dismissal of your case by your chosen forum.

Please read carefully each of the three main possible choices of review below to decide which one applies to your particular case. If you have questions about whether a particular forum is the appropriate one to review your case, you should contact that forum for more information.

(1) Judicial review in general. As a general rule, an appellant seeking judicial review of a final Board order must file a petition for review with the U.S. Court of Appeals for the Federal Circuit, which must be received by the court within **60 calendar days** of the date of issuance of this decision. 5 U.S.C. § 7703(b)(1)(A).

If you submit a petition for review to the U.S. Court of Appeals for the Federal Circuit, you must submit your petition to the court at the following address:

U.S. Court of Appeals
for the Federal Circuit
717 Madison Place, N.W.
Washington, D.C. 20439

Additional information about the U.S. Court of Appeals for the Federal Circuit is available at the court's website, www.cafc.uscourts.gov. Of particular relevance is the court's "Guide for Pro Se Petitioners and Appellants," which is contained within the court's Rules of Practice, and Forms 5, 6, 10, and 11.

If you are interested in securing pro bono representation for an appeal to the U.S. Court of Appeals for the Federal Circuit, you may visit our website at http://www.mspb.gov/probono for information regarding pro bono representation for Merit Systems Protection Board appellants before the Federal Circuit. The

Board neither endorses the services provided by any attorney nor warrants that any attorney will accept representation in a given case.

(2) Judicial or EEOC review of cases involving a claim of discrimination. This option applies to you only if you have claimed that you were affected by an action that is appealable to the Board and that such action was based, in whole or in part, on unlawful discrimination. If so, you may obtain judicial review of this decision—including a disposition of your discrimination claims—by filing a civil action with an appropriate U.S. district court (*not* the U.S. Court of Appeals for the Federal Circuit), within **30 calendar days** after you receive this decision. 5 U.S.C. § 7703(b)(2); *see Perry v. Merit Systems Protection Board*, 582 U.S. ____ , 137 S. Ct. 1975 (2017). If you have a representative in this case, and your representative receives this decision before you do, then you must file with the district court no later than **30 calendar days** after your representative receives this decision. If the action involves a claim of discrimination based on race, color, religion, sex, national origin, or a disabling condition, you may be entitled to representation by a court-appointed lawyer and to waiver of any requirement of prepayment of fees, costs, or other security. *See* 42 U.S.C. § 2000e-5(f) and 29 U.S.C. § 794a.

Contact information for U.S. district courts can be found at their respective websites, which can be accessed through the link below:

http://www.uscourts.gov/Court_Locator/CourtWebsites.aspx.

Alternatively, you may request review by the Equal Employment Opportunity Commission (EEOC) of your discrimination claims only, excluding all other issues. 5 U.S.C. § 7702(b)(1). You must file any such request with the EEOC's Office of Federal Operations within **30 calendar days** after you receive this decision. 5 U.S.C. § 7702(b)(1). If you have a representative in this case, and your representative receives this decision before you do, then you must file

with the EEOC no later than **30 calendar days** after your representative receives this decision.

If you submit a request for review to the EEOC by regular U.S. mail, the address of the EEOC is:

Office of Federal Operations
Equal Employment Opportunity Commission
P.O. Box 77960
Washington, D.C. 20013

If you submit a request for review to the EEOC via commercial delivery or by a method requiring a signature, it must be addressed to:

Office of Federal Operations
Equal Employment Opportunity Commission
131 M Street, N.E.
Suite 5SW12G
Washington, D.C. 20507

(3) Judicial review pursuant to the Whistleblower Protection Enhancement Act of 2012. This option applies to you only if you have raised claims of reprisal for whistleblowing disclosures under 5 U.S.C. § 2302(b)(8) or other protected activities listed in 5 U.S.C. § 2302(b)(9)(A)(i), (B), (C), or (D). If so, and your judicial petition for review "raises no challenge to the Board's disposition of allegations of a prohibited personnel practice described in section 2302(b) other than practices described in section 2302(b)(8), or 2302(b)(9)(A)(i), (B), (C), or (D)," then you may file a petition for judicial review either with the U.S. Court of Appeals for the Federal Circuit or any court of appeals of competent jurisdiction.[10] The court of appeals must receive your

[10] The original statutory provision that provided for judicial review of certain whistleblower claims by any court of appeals of competent jurisdiction expired on December 27, 2017. The All Circuit Review Act, signed into law by the President on July 7, 2018, permanently allows appellants to file petitions for judicial review of MSPB decisions in certain whistleblower reprisal cases with the U.S. Court of Appeals for the Federal Circuit or any other circuit court of appeals of competent jurisdiction. The All Circuit Review Act is retroactive to November 26, 2017. Pub. L. No. 115-195, 132 Stat. 1510.

petition for review within **60 days** of the date of issuance of this decision. 5 U.S.C. § 7703(b)(1)(B).

If you submit a petition for judicial review to the U.S. Court of Appeals for the Federal Circuit, you must submit your petition to the court at the following address:

U.S. Court of Appeals
for the Federal Circuit
717 Madison Place, N.W.
Washington, D.C. 20439

Additional information about the U.S. Court of Appeals for the Federal Circuit is available at the court's website, www.cafc.uscourts.gov. Of particular relevance is the court's "Guide for Pro Se Petitioners and Appellants," which is contained within the court's Rules of Practice, and Forms 5, 6, 10, and 11.

If you are interested in securing pro bono representation for an appeal to the U.S. Court of Appeals for the Federal Circuit, you may visit our website at http://www.mspb.gov/probono for information regarding pro bono representation for Merit Systems Protection Board appellants before the Federal Circuit. The Board neither endorses the services provided by any attorney nor warrants that any attorney will accept representation in a given case.

Contact information for the courts of appeals can be found at their respective websites, which can be accessed through the link below:

http://www.uscourts.gov/Court_Locator/CourtWebsites.aspx.

FOR THE BOARD: /s/ for

Jennifer Everling
Acting Clerk of the Board

Washington, D.C.

DEFENSE FINANCE AND ACCOUNTING SERVICE
Civilian Pay Operations

DFAS BACK PAY CHECKLIST

The following documentation is required by DFAS Civilian Pay to compute and pay back pay pursuant to 5 CFR § 550.805. Human resources/local payroll offices should use the following checklist to ensure a request for payment of back pay is complete. Missing documentation may substantially delay the processing of a back pay award. **More information may be found at: https://wss.apan.org/public/DFASPayroll/Back%20Pay%20Process/Forms/AllItems.aspx.**

NOTE: Attorneys' fees or other non-wage payments (such as damages) are paid by vendor pay, not DFAS Civilian Pay.

☐ 1) Submit a **"SETTLEMENT INQUIRY - Submission"** Remedy Ticket. Please identify the specific dates of the back pay period within the ticket comments.

Attach the following documentation to the Remedy Ticket, or provide a statement in the ticket comments as to why the documentation is not applicable:

☐ 2) Settlement agreement, administrative determination, arbitrator award, or order.

☐ 3) Signed and completed "Employee Statement Relative to Back Pay".

☐ 4) All required SF50s (new, corrected, or canceled). *****Do not process online SF50s until notified to do so by DFAS Civilian Pay.*****

☐ 5) Certified timecards/corrected timecards. *****Do not process online timecards until notified to do so by DFAS Civilian Pay.*****

☐ 6) All relevant benefit election forms (e.g. TSP, FEHB, etc.).

☐ 7) Outside earnings documentation. Include record of all amounts earned by the employee in a job undertaken during the back pay period to replace federal employment. Documentation includes W-2 or 1099 statements, payroll documents/records, etc. Also, include record of any unemployment earning statements, workers' compensation, CSRS/FERS retirement annuity payments, refunds of CSRS/FERS employee premiums, or severance pay received by the employee upon separation.

Lump Sum Leave Payment Debts: When a separation is later reversed, there is no authority under 5 U.S.C. § 5551 for the reinstated employee to keep the lump sum annual leave payment they may have received. The payroll office must collect the debt from the back pay award. The annual leave will be restored to the employee. Annual leave that exceeds the annual leave ceiling will be restored to a separate leave account pursuant to 5 CFR § 550.805(g).

USDA UNITED STATES DEPARTMENT OF AGRICULTURE

NATIONAL FINANCE CENTER CHECKLIST FOR BACK PAY CASES

Below is the information/documentation required by National Finance Center to process payments/adjustments agreed on in Back Pay Cases (settlements, restorations) or as ordered by the Merit Systems Protection Board, EEOC, and courts**.**

1. Initiate and submit AD-343 (Payroll/Action Request) with clear and concise information describing what to do in accordance with decision.
2. The following information must be included on AD-343 for Restoration:
    a. Employee name and social security number.
    b. Detailed explanation of request.
    c. Valid agency accounting.
    d. Authorized signature (Table 63).
    e. If interest is to be included.
    f. Check mailing address.
    g. Indicate if case is prior to conversion. Computations must be attached.
    h. Indicate the amount of Severance and Lump Sum Annual Leave Payment to be collected (if applicable).

Attachments to AD-343

1. Provide pay entitlement to include Overtime, Night Differential, Shift Premium, Sunday Premium, etc. with number of hours and dates for each entitlement (if applicable).
2. Copies of SF-50s (Personnel Actions) or list of salary adjustments/changes and amounts.
3. Outside earnings documentation statement from agency.
4. If employee received retirement annuity or unemployment, provide amount and address to return monies.
5. Provide forms for FEGLI, FEHBA, or TSP deductions. (if applicable)
6. If employee was unable to work during any or part of the period involved, certification of the type of leave to be charged and number of hours.
7. If employee retires at end of Restoration Period, provide hours of Lump Sum Annual Leave to be paid.

NOTE: If prior to conversion, agency must attach Computation Worksheet by Pay Period and required data in 1-7 above.

The following information must be included on AD-343 for Settlement Cases: (Lump Sum Payment, Correction to Promotion, Wage Grade Increase, FLSA, etc.)

    a. Must provide same data as in 2, a-g above.
    b. Prior to conversion computation must be provided.
    c. Lump Sum amount of Settlement, and if taxable or non-taxable.

If you have any questions or require clarification on the above, please contact NFC's Payroll/Personnel Operations at 504-255-4630.